



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

December 24, 2014
PR 14-38

Mark McBurney, Esquire

Re: Susler v. West Glocester Fire District

Dear Mr. McBurney:

The investigation into the Access to Public Records Act ("APRA") complaint filed on behalf of your client, Mr. Craig Susler is complete. By letter dated November 21, 2013, Mr. Susler filed an APRA request with the West Glocester Fire District ("Fire District"), seeking:

- "1. the minutes of the 11/19/13 WGFD meeting.
2. the yearly notice WGFD provided to the Secretary of State's office specifying WGFD's meetings for 2013.
3. any and all Ethics filings by [John Doe]¹
4. any and all Ethics filings by [Jane Doe]
5. all WGFD certificates of compliance under RIGL 38-2-3.16
6. the WGFD's published procedures for obtaining recordings under the Access to Public Records Act.
7. if the document(s) responsive to #6, above, exist but do not indicate a date of publication of the WGFD's procedures to access public records, then any document showing the date on which those procedures were published."

¹ The identity of John and Jane Doe is irrelevant to our finding, and therefore, we decline to name these persons.

By letter dated December 3, 2013, the Fire District responded to Mr. Susler, indicating:

“[t]he information requested on 11,26,2013, will be available for pickup at West Glocester Fire District, 2410 Putnam Pike, Glocester, RI 02814, by December 9, 2013. Total cost for the retrieval will be for 3 copies@.15=.45 and 6 hrs retrieval at \$15.00 Per Hr. cost \$90.00 minus the first hour of \$15.00=\$75.00. Total cost made payable to the West Glocester Fire District will be \$75.45, payable prior to retrieval of records.”

The Fire District provided a response to your allegation, which will be detailed later, and you provided a rebuttal.

At the outset, we note that in examining whether an APRA violation has occurred, we are mindful that our mandate is not to substitute this Department’s independent judgment concerning whether an infraction has occurred, but instead, to interpret and enforce the APRA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the Fire District violated the APRA. See R.I. Gen. Laws § 38-2-7. In other words, we do not write on a blank slate.

Here, the majority of your complaint concerns the allegation that the Fire District violated the APRA when: (1) the Fire District indicated in its December 3, 2013 response that the requested documents “will be available for pickup * * * by December 9, 2013,” and (2) the Fire District failed to indicate the non-existence of certain documents in its December 3, 2013 response. We find no violations.

In particular, while you claim that the December 3, 2013 response imposed a deadline (December 9, 2013) by which the requested documents had to be obtained, we simply read the totality of the Fire District’s response as indicating the requested documents will be available for pick-up after a specified period of time, i.e., December 9, 2013. With respect to your claim that the Fire District failed to indicate that specified documents did not exist at the time of your APRA request, we make the following observations:

1. Having thoroughly reviewed this matter, we have great difficulty determining what documents were provided to you by the Fire District. The Fire District’s December 3, 2013 response indicates that it has charged you for copies of three (3) pages, but your complaint includes copies of the Ethics Commission filings for John and Jane Doe, which total eight (8) pages. It appears a third document may have been provided to you, but it is unclear to us the nature of the document provided;
2. With respect to your allegation that the Fire District violated the APRA when it provided you copies of John and Jane Doe’s Ethics Commission filings, rather than indicating that

no such documents existed at the time your APRA request was made, we find no violation. While the Fire District was under no APRA obligation to provide such documents, see R.I. Gen. Laws § 38-2-3(h), its decision to provide such documents, and its concomitant omission to indicate that it was not providing such documents because they were not maintained at the time of your request (as you allege), can hardly be described as an APRA violation. Moreover, both documents clearly evince they were created after your November 21, 2013 APRA request, conflicting with the nefarious and deceitful intent you ascribe to the Fire District;

3. With respect to your allegation that the Fire District violated the APRA because it should have indicated that no “published” APRA procedures existed, we also find no violation. Again, the record is unclear whether and how the Fire District responded to your November 21, 2013 APRA request seeking “the WGFD’s published procedures for obtaining records under the Access to Public Records Act,” but what is clear is that by letter dated January 8, 2014, you again sought “[t]he WGFD’s published procedures for obtaining records under the Access to Public Records Act, if they exist.” When the Fire District responded to your January 8, 2014 APRA request (by letter dated January 15, 2014), it provided its APRA procedures and indicated that “[t]here is no requirement by the Act that the written procedures be ‘published.’” Based upon this latter sentence, i.e., that the APRA does not require that written procedures be published, you claim that the Fire District should have responded to your November 21, 2013 APRA request by indicating that no “published” APRA procedures exist. We find no violation and deem further explanation unnecessary.

Notwithstanding the foregoing, we do deem the Fire District’s response deficient in two respects. First, we conclude that the Fire District’s response was deficient since it failed to provide “the specific reasons for the denial.” R.I. Gen. Laws § 38-2-7(a). In this respect, it is important to observe that the APRA request – as set forth above – enumerates seven (7) categories of requested documents and the Fire District’s response provides that:

“[t]he information requested on 11,26,2013, will be available for pickup at West Glocester Fire District, 2410 Putnam Pike, Glocester, RI 02814, by December 9, 2013. Total cost for the retrieval will be for 3 copies@.15=.45 and 6 hrs retrieval at \$15.00 Per Hr. cost \$90.00 minus the first hour of \$15.00=\$75.00. Total cost made payable to the West Glocester Fire District will be \$75.45, payable prior to retrieval of records.”

Our review of the record makes clear that the Fire District did not provide documents to all requested categories, such as the request for the annual notice provided to the Secretary of State

for the Fire District's 2013 meetings. Respectfully, its failure to identify the "specific reasons for the denial" of documents violated the APRA. See R.I. Gen. Laws § 38-2-7(a).

Lastly, we conclude that the Fire District violated the APRA when it assessed a six (6) hour charge for search and retrieval. In the Fire District's affidavit, Chairman William J. Flynn indicated, in relevant part:

"The Claimant's request, among other items, sought 'any and all Ethics filings by [John Doe and Jane Doe];

The Claimant also requested the yearly notice the District provided 'to the Secretary of State's office specifying [the Fire District's] meetings for 2013;'

There was no knowledge of the existence or non-existence of any of the requested documents until the research was completed;

Notification of the non-existence of any requested document could not be made until after the research was completed;

* * *

The District's certificates of compliance under RIGL § 38-2-3.16 did not exist at the time of the Claimant's request but were completed and available at the time of notification to the Claimant of the retrieval costs for the requested documentation;

The charges assessed were fair and reasonable and were set forth in the District's subsequent response to the Claimant's request for documents dated February 17, 2014 (2-17-14 APRA Request);

The research required review of all records created by the Board, the Chief and the Clerk to determine whether the documents existed;

All copies of documents that were requested and existed and that could be produced have been maintained by the District awaiting payment by the Claimant."

While you take issue with the Fire District's assessment of a six (6) hour charge for search and retrieval, resulting in three (3) documents and the determination that other requested documents were not maintained, our review of the evidence (and conclusion) is not dependent upon the number of documents ultimately provided to you.

Instead, our conclusion rests upon the determination that the Fire District has failed to substantiate its search and retrieval charge. While we certainly can appreciate that the Fire

District may not have had “knowledge of the existence or non-existence of any of the requested documents until the research was completed,” see Flynn Affidavit, ¶ 9, in our opinion, the Fire District failed to substantiate (or explain) the depth and nature of its search. Indeed, our review of Chairman Flynn’s affidavit finds only the representation that the “charges assessed were fair and reasonable” and that the “research required review of all records created by the Board, the Chief and the Clerk to determine whether the documents existed.” Respectfully, the former representation is conclusionary and provides no insight for this Department to ultimately determine whether the charges were “fair and reasonable,” while the latter statement also provides no information for this Department to determine what locations were searched, why these locations were searched, the success or failure of the search, and any other information to explain the search and retrieval. An example of the type of non-conclusionary evidence that could support a search and retrieval assessment was observed in Duxbury v. Town of Coventry, PR 13-16. The Fire District’s reference to its February 19, 2014 letter does little to elucidate the charges assessed in its December 3, 2013 letter.

Upon a finding of an APRA violation, the Attorney General may file a complaint in Superior Court on behalf of the Complainant, requesting “injunctive or declaratory relief.” See R.I. Gen. Laws § 38-2-8(b). A court “shall impose a civil fine not exceeding two thousand dollars (\$2,000) against a public body...found to have committed a knowing and willful violation of this chapter, and a civil fine not to exceed one thousand dollars (\$1,000) against a public body found to have recklessly violated this chapter***.” See R.I. Gen. Laws § 38-2-9(d).

In this case, we conclude that neither remedy is appropriate at this time. Namely, we find insufficient evidence that the violations discussed herein were willful and knowing, or reckless, and although injunctive relief may be appropriate to remedy the search and retrieval assessment, we will allow the Fire District an opportunity to remedy this violation on its own. As we noted, supra, it is unclear to us what documents were provided pursuant to your November 21, 2013 APRA request, and there is at least some evidence that the Fire District was withholding documents responsive to your November 21, 2013 APRA request pending payment. It is unclear to us whether payment was ever tendered, and it is unknown to us whether you received documents pursuant to your November 21, 2013 APRA request, or whether you received similar documents pursuant to some other APRA request. For the reasons already detailed, we conclude that the search and retrieval assessment was not adequately substantiated by the Fire District, and accordingly, if this full amount (\$75.45) has been paid, it should be refunded. See R.I. Gen. Laws § 38-2-7(b). To the extent that this amount has not been paid, the Fire District cannot collect payment and the three (3) copies referenced in its December 3, 2013 letter should be provided. Id.

This finding serves as notice to the Fire District that its actions violated the APRA and may serve as evidence of a willful and knowing or reckless violation in any future similar case. We

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respectfully request that legal counsel ensure the Fire District is aware of this finding and the requirements of the APRA.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael W. Field". The signature is fluid and cursive, with the first name "Michael" being the most prominent part.

Michael W. Field
Assistant Attorney General

MWF/pl

Cc: Daniel J. Archetto, Esq.
Vicki Bejma, Esq.